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No. 88-72

In the Supreme Court of the United States

OCTOBER TERM, 1988

PINNEY DOCK & TRANSPORT CO., PETITIONER

v.

NORFOLK & WESTERN RAILWAY CO., ET AL.

LITTON INDUSTRIES, INC., ET AL., PETITIONERS

v.

NORFOLK & WESTERN RAILWAY CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

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Bereft of any valid or principled basis for opposing certiorari, respondents' principal arguments rely on: (1) mischaracterizations of the claims in this case; and (2) mischaracterizations of the decisions in other cases.

1. A pervasive theme of respondents' submission is their studied avoidance of the fact that "the heart of [petitioners'] claim . . . is the alleged conspiracy itself"—a con-

spiracy "to boycott and eliminate a direct competitor so as to monopolize a market" (Pet. App. 120a, 91a). Respondents ignore the actual claims in this case in favor of claims they think more neatly fit possible defenses. The unbridged chasm between respondents' arguments and the actual record in this case is evident from respondents' discussion of the statutory immunity and *Keogh* issues, which fails to acknowledge that the complaints in this case allege a conspiracy to monopolize that includes conduct beyond the scope of proper rate bureau activity.

Contrary to respondents' mischaracterization (Br. in Opp. 2), echoed by the court of appeals (Pet. App. 75a-76a), there are no "rate" and "non-rate" claims in this case. The only claim is a claim of conspiracy. Similarly, there is no challenge in this case to any filed rate as a measure for awarding damages. Petitioners are not shippers seeking damages equal to the differential between the filed rate and some hypothetical rate; petitioners sought to compete with respondents and seek damages based solely on lost profits resulting from their exclusion from the market.

2. There is no merit to respondents' suggestion that the decision below can be reconciled with the decision of the District of Columbia Circuit in the related criminal case based on the same conspiratorial conduct (*United States v. Bessemer & L.E.R.R.*, 717 F.2d 593 (D.C. Cir. 1983)). Respondents engage in wishful thinking when they argue that the District of Columbia Circuit *might have* rested its decision only on what respondents mischaracterize as "non-rate" claims. But the District of Columbia Circuit expressly invoked broader grounds for its judgment. Correctly recognizing that the indictment charged a *conspiracy*, the court held that even rate-related acts that were taken in furtherance of the conspiracy were subject to antitrust scrutiny (*id.* at 600):

> 'Even though it should be found in the end that the practices as such have been validly immunized by section 5a approved agreements, nevertheless, if they are part of an effort by Railroads in combination or conspiracy to eliminate the competition . . . , rather than used merely to meet that competition, the practices would be removed from the protection of section 5a(9).' [1]

The conflict could not be more plain. The District of Columbia Circuit upheld the imposition of criminal sanctions for the same conduct the court below held to be immune from civil liability.[2]

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[1] Quoting *Atchison, T. & S.F. Ry. v. Aircoach Transp. Ass'n*, 253 F.2d 877 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 930 (1960). *See also* 717 F.2d at 601 (specifically rejecting respondents' contention that their imposition of higher bulker handling charges on self-unloaders was immune).

[2] Nor is there any merit to respondents' labored denial of a conflict among the circuits on the corollary question whether predatory motive will forfeit any statutory or implied antitrust immunity that might otherwise attach. On this question, the decision below (Pet. App. 23-24) conflicts with decisions of this Court and of other courts of appeals. *See United Mine Workers v. Pennington*, 381 U.S. 657, 661-69 (1965); *Aloha Airlines, Inc. v. Hawaiian Airlines, Inc.*, 489 F.2d 203, 211-12 (9th Cir. 1973), *cert. denied*, 417 U.S. 913 (1974); *Atchison, T. & S.F. Ry. v. Aircoach Transp. Ass'n*, 253 F.2d 877, 887 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 930 (1960). *See also United States v. Braniff Airways, Inc.*, 453 F. Supp. 724, 728-29 (W.D. Tex. 1978); *United States v. American Telephone & Telegraph Co.*, 461 F. Supp. 1314, 1328-29 (D.D.C. 1978); *BBD Transportation Co. v. U.S. Steel Corp.*, 1976-2 Trade Cas. (CCH) ¶ 61,079 (N.D. Cal. 1976); *United States v. Morgan Drive Away, Inc.*, 1974-1 Trade Cas. (CCH) ¶ 74,888 (D.D.C. 1974); *Marnell v. United Parcel Service of America, Inc.*, 260 F. Supp. 391, 403-04 (N.D. Cal. 1966); *Riss & Co. v. Ass'n of American Railroads*, 170 F. Supp. 354, 362 (D.D.C.), *cert. denied sub nom., Atlantic Coastline Railroad Co. v. Riss & Co.*, 361 U.S. 804 (1959); *Slick Airways, Inc. v. American Airlines, Inc.*, 107 F. Supp.

This conflict on the proper scope of immunity from the antitrust laws touches on important and recurring questions in the vital transportation sector of the economy, and, indeed, for all regulated industries. There is, therefore, no validity to respondents' contention (Br. in Opp. 12) that the significance of a decision in this case would be blunted because the Interstate Commerce Act, as amended by the Reed-Bulwinkle Act, has been further amended.[3]

In fact, the Railroad Revitalization and Regulatory Reform Act of 1976 ("4R Act") and the Staggers Rail Act of 1980 preserve the limited antitrust immunity contained in the Reed-Bulwinkle Act. Neither the language nor the legislative histories of the Staggers and 4R Acts indicate that Congress intended to depart from the criteria tradi-

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199, 207 (D.N.J. 1952), *appeal dismissed sub nom., American Airlines, Inc. v. Forman,* 204 F.2d 230 (3d Cir.), *cert. denied,* 346 U.S. 806 (1953).

Nor is there any validity to respondents' misreading of *United Mine Workers v. Pennington,* 381 U.S. 657 (1965). On the issue of *statutory* immunity, this Court held in *Pennington* that a statutory exemption from the antitrust laws is forfeited where, as here, otherwise exempt action is taken with an anticompetitive purpose and restrains "the freedom of economic units to act according to their own choice and discretion" *id.* at 668. In another portion of its opinion, dealing with *constitutional* immunity—hence, not relevant here—the Court made the comments on which respondents seize (Br. in Opp. 9, 10 n.10). As *Pennington* itself makes clear in its rejection of the same arguments respondents offer here, constitutional immunity is not co-extensive with statutory immunity.

[3] A decision on the merits by this Court would have a profound impact on the eleven lawsuits against respondents for the same conduct that are pending in consolidated pretrial proceedings in the Eastern District of Pennsylvania (*see* Pet. 5 n.1). Those cases were originally filed in district courts in the Second, Third, Sixth and District of Columbia Circuits. In the absence of an authoritative decision by this Court, the conflicting views of the courts of appeals will plague the multidistrict cases.

tionally used to determine the scope and limits of railroad antitrust immunity.[4] In any event, the existence of the Staggers and 4R Acts did not dissuade this Court from examining the legislative history of the Reed-Bulwinkle Act in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 418-19 (1986), and those statutes provide no basis for avoiding review here. If anything, Congress' move towards increased deregulation enhances the importance of confining the statutory immunity to its proper, limited scope.

3. Respondents prefer to ignore the plain fact, evident to the court below, that the decision in this case conflicts with holdings of the Second, Third, and Ninth Circuits. Those courts of appeals have expressly rejected efforts to

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[4] Although the 4R Act and Staggers Act have substantially reduced the role of rate bureaus in the formulation of rate determinations, the statutes do permit joint agreements in certain areas. While the Reed-Bulwinkle language has been changed, the same limited antitrust immunity applies to the surviving rate bureaus and joint agreements and, in particular, continues to apply with full force to motor carriers. *See* 49 U.S.C. § 10706(b)(2). Railroads and motor carriers must comply with the terms of such joint agreements and any conditions set by the ICC in order to enjoy antitrust immunity. *See* 49 U.S.C. § 10706(a)(2)(A) ("[i]f the Commission approves the agreement, it may be carried out *under its terms and under the conditions required by the Commission,* and the [antitrust laws] do not apply to parties and other persons *with respect to making or carrying out the agreement.*") (emphasis added). *See also* 49 U.S.C. §§ 10706(a)(4) & (b)(2). Furthermore, the right of independent action is explicitly preserved. *See* §§ 10706(b)(3)(B)(ii) & (d)(2)(c). The very pre-conditions for immunity survive the more recent legislation, and this Court's decision on Reed-Bulwinkle immunity clearly would inform the immunity analysis for future cases.

The legislative history of the Staggers Act also indicates that certain "procedural protections" were put into place for joint discussions so as to "insure that remedies for anti-competitive activities remain under existing laws." H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 114 (1980).

expand *Keogh* to bar claims by competitors. In contrast, the Sixth Circuit is the first court of appeals ever to expand *Keogh* in this way.

The principal basis upon which respondents seek to blind this Court to the obvious conflict is the suggestion that *Keogh* is limited to the Interstate Commerce Act. Respondents contend, therefore, that the conflict that exists between the decision below and the decisions of the Second and Third Circuits is of no consequence because the latter cases did not arise under the Interstate Commerce Act. The federal courts have never accepted respondents' exceedingly narrow view of *Keogh*. *Keogh* has consistently been a guide to analysis in a broad array of regulatory regimes.[5] It is too late in the day to accept respondents' contention that *Keogh* does not apply outside the context of the Interstate Commerce Act.

At all events, even within the universe of Interstate Commerce Act cases, *Keogh* has never before been the basis for barring claims by a competitor. Respondents' empty boast that there is "ample precedent in this Court" for applying *Keogh* to a competitor in the ICC context (Br. in Opp. at 16 n.16) is exposed by respondents' inability to cite a single case for that proposition.[6] On the con-

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[5] *See, e.g., Pan American World Airways, Inc. v. United States,* 371 U.S. 296, 309-10 (1963) (Civil Aeronautics Act); *United States v. RCA,* 358 U.S. 334, 347-48 (1959) (Federal Communications Act); *Far East Conference v. United States,* 342 U.S. 570, 574 (1951) (Shipping Act of 1916); *City of Kirkwood v. Union Electric Co.,* 671 F.2d 1173, 1178-79 (8th Cir. 1982), *cert. denied,* 459 U.S. 1170 (1983) (Federal Power Act); *City of Mishawaka v. Indiana & Michigan Electric Co.,* 560 F.2d 1314, 1317 (7th Cir. 1977), *cert. denied,* 436 U.S. 922 (1978) (Federal Power Act); *McCleneghan v. Union Stock Yards Co.,* 298 F.2d 659, 667 (8th Cir. 1962) (Packers and Stockyard Act).

[6] Respondents again engage in wishful thinking when they suggest (Br. in Opp. 15 n.16) that in *Georgia v. Pennsylvania R.R.,* 324 U.S.

trary, this Court's precedents (*Keogh, Georgia,* and *Square D*) overwhelmingly show that *Keogh* has been used to preclude only *shippers'* antitrust claims.[7]

There is good reason why *Keogh* has never barred a competitor's claims: the rationale of *Keogh* is wholly inapplicable in these circumstances. This Court explained in *Terminal Warehouse Co. v. Pennsylvania R.R.*, 297 U.S. at 516, that *Keogh* poses no bar when "the damages caused by a conspiracy to monopolize [are] being measured not merely by the consequences flowing from the [rate] preference, but by those flowing from the conspiracy in all its comprehensive unity." [8] The situation presaged by this

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439 (1945), this Court *might have* dismissed damage claims brought by a competitor if only such claims had been asserted. The reality, of course, is that Georgia brought no damage claims as a competitor and this Court, therefore, could not and did not dismiss any such claims (*see* Pet. 16-17).

[7] Finding no cases applying *Keogh* to a competitor, respondents cite cases barring a competitor's antitrust claim on grounds having nothing to do with *Keogh* (Br. in Opp. 15). *See Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658 (1963) (district court was without power to suspend rates pending an ICC investigation, where a statutory provision required such rates to go into effect after a seven month period); *Terminal Warehouse Co. v. Pennsylvania R.R.*, 297 U.S. 500 (1936) (plaintiff was barred, not by *Keogh,* but by electing to pursue ICA remedies before the ICC, which had denied reparations on the merits). Respondents also cite *Seatrain Lines, Inc. v. Pennsylvania R.R.*, 207 F.2d 255 (3d Cir. 1953), a decision which does not even mention *Keogh.*

[8] *Accord Delaware & H. Ry. v. Consolidated Rail Corp.*, 654 F. Supp. 1195, 1205 (N.D.N.Y. 1987); *TransKentucky Transp. R.R. v. Louisville & N.R.R. Co.*, 581 F. Supp. 759, 767 (E.D. Ky. 1983); *MCI Communications Corp. v. AT&T*, 462 F. Supp. 1072, 1100 (N.D. Ill. 1978), *aff'd in part and rev'd in part on other grounds*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *Keith Ry. Equip. Co. v. Association of American Railroads*, 64 F. Supp. 917, 920 (N.D. Ill. 1946) (all rejecting the *Keogh* defense where rate conduct is part of a broader scheme to monopolize).

Court in *Terminal Warehouse* is present here. Petitioners' damages resulted from their exclusion from the iron ore transportation and handling market, not from their having paid a rate that they later claimed to be unlawful.

Keogh is further inapplicable to competitors because, while the ICC can award a shipper reparations for a discriminatory rate, the ICC has no authority to award to a competitor its lost profits caused by monopolization.[9] That is the situation here and this Court should grant certiorari to review a decision that denies competitors the Sherman Act remedy Congress intended.

4. Respondents make no effort to defend the court of appeals' disposition of an issue—petitioner Litton's standing—over which that court had no jurisdiction. As is undisputed, the decision below conflicts with this Court's holding in *United States v. Stanley,* 107 S.Ct. 3054 (1987), that a court of appeals has no jurisdiction under 28 U.S.C. § 1292(b) to consider an issue that was not raised, considered or decided in the district court and was not contained in any order certified for interlocutory appeal.

Respondents offer only the arrogant suggestion that the court of appeals' plain usurpation of authority makes "no practical difference" and is "meaningless as a matter of fact" (Br. in Opp. 23-24). In contrast to respondents' cavalier attitude toward federal court jurisdiction, this Court correctly recognizes "the central principle of a free

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[9] The ICC's statutory authority to investigate complaints, and award damages, is limited to violations of the ICA—not antitrust violations. 49 U.S.C. §§ 11701 and 11705. *See McLean Trucking Co. v. United States,* 321 U.S. 67, 79 (1944) (the ICC "has no power to enforce the Sherman Act"). *Accord Marnell v. United Parcel Service of America, Inc.,* 260 F. Supp. 391, 404 (N.D. Cal. 1966); *Drum Transport, Inc. v. United States,* 298 F. Supp. 667, 670 (S.D. Ill. 1969); *Union Pacific-Control-Missouri Pacific: Western Pacific,* 366 I.C.C. 462, 485 (1982); *Central Yellow Pine Ass'n v. Illinois Central R.R.,* 10 I.C.C. 505, 541 (1905).

society that courts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from the very wrong asserted here, the excessive use of judicial power." *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 108 S. Ct. 2268, 2271 (1988). *See also Torres v. Oakland Scavenger Co.*, 108 S. Ct. 2405, 2409 n.3 (1988) ("a litigant's failure to clear a jurisdictional hurdle can never be 'harmless' or waived by a court"); *King Bridge Co. v. Otoe County*, 120 U.S. 225, 226 (1887) ("the rule . . . is inflexible and without exception, which requires [a federal court] of its own motion, to deny its own jurisdiction . . . in all cases where such jurisdiction does not affirmatively appear in the record").

Similarly, respondents muster no defense for the court of appeals' further overstepping of the proper bounds of appellate review. The court below—on an interlocutory appeal and without even obtaining the record from the district court (see Pet. 24-25 n.23)—reversed the district court's ruling that factual disputes precluded entry of summary judgment on the statute of limitations issue. Respondents can say no more than that the court of appeals "referred" to the correct abuse of discretion standard (Br. in Opp. 23 n.23). But after making this "reference," the court of appeals expressly disavowed reliance on that standard, acknowledging that application of the abuse of discretion standard would have produced an entirely different result (*see* Pet. 23; Pet. App. 70a-71a).

In reaching out to decide some issues that were never certified and in deciding factual issues that are not proper subjects for interlocutory appeal,[10] the court of appeals

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[10] *See Tidewater Oil Co. v. United States*, 409 U.S. 151, 165, 171-72 (1972) (Section 1292(b) "hardly created a general right of interlocutory appeal"; "questions that would be presented to the courts of appeals under § 1292(b) would often involve *threshold procedural issues not requiring extensive analysis of the record*") (footnote omitted & emphasis added).

explicitly discarded accepted standards for review. The court of appeals exacerbated these errors and transgressed a fundamental limitation on appellate review when it engaged in precisely the conduct this Court criticized in *Amadeo v. Zant,* 108 S. Ct. 1771, 1777 (1988):

> the Court of Appeals offered factual rather than legal grounds for its reversal of the District Court's order . . . [and] simply expressed disagreement and substituted its own factual findings for those of the District Court.

These usurpations of power should not be permitted to stand.

For the foregoing reasons and the reasons stated in the petition, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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